

## ADVANCE DIRECTIVES IN MONTANA LAW

I. ADVANCE DIRECTIVES RELATING TO THE OCCURRENCE OF TERMINAL ILLNESS

## A. STATUTORY RIGHTS IN MONTANA RELATING TO THE TERMINATION OF LIFE-SUPPORTING MEDICAL TREATMENT

The "Montana Rights of the Terminally Ill Act" recognizes the right of a person in anticipation of their death by terminal illness or at the time of their terminal illness to consent to the withholding or withdrawal of life-sustaining medical treatment if that treatment is for the purpose of prolonging their life. A physician must make the medical determination that the person is terminally ill and would die shortly but for the provision of life-supporting medical treatment.

A person by a written declaration may provide, in anticipation of the person's possible future incapacity, that the person consents for the physician and other health care providers to withhold or withdraw life-sustaining medical treatment if the physician determines that the person is terminally ill. The person may alternatively provide that at the time of the incapacity and terminal illness the consent for withdrawal of the life-sustaining medical treatment be made by a particular person or persons designated in the person's written declaration.

The Act affirms the right of a person who is not mentally incapacitated to voluntarily consent to withdrawal or withholding of medical treatment that is prolonging the life of the person when

suffering from a terminal illness. The Act does not require persons to write and sign a declaration.

B. DESCRIPTION OF THE "MONTANA RIGHTS OF THE TERMINALLY ILL ACT"

The termination of life-supporting medical treatment in Montana is governed by the "Montana Rights of the Terminally Ill Act", codified at Chapter 9 of Title 50, MCA.

The "Montana Rights of the Terminally Ill Act" generally provides authority, procedures and suggested documents by which a person may provide consent or, designate another person to provide consent on their behalf for the termination of life-supporting medical treatment when the person is terminally ill. The Act also includes provisions governing consent for termination of medical treatment by others when the person is incapable of expressing a personal desire.

A person may provide written direction for removal of life-sustaining medical treatment, if at the time of signing for the written document the person is of sound mind and 18 or more years of age. 50-9-103(1), MCA. The written declaration must be witnessed by two persons. 50-9-103, MCA.

The standard for withdrawal of medical treatment provided by the Act is that the person has an incurable or irreversible condition that, without the administration of life-sustaining treatment,

will, in the opinion of the attending physician cause the person's death within a relatively short time. The physician by this standard makes a determination as to whether the medical treatment serves only to prolong the process of dying and is not necessary to the person's comfort or to alleviate the person's pain. 50-9-103, MCA.

A person may provide direction to physicians and health care providers concerning life-sustaining medical treatment for incurable conditions by a written instrument which acknowledges the above stated standard and directs the provision of medical treatment be done in accordance with that standard. 50-9-103, MCA. A person may also by a written instrument provide that another person based on the standard make the decision for the person and that the physicians and health care providers abide by that decision. Attached are the suggested forms of the written documents as provided by the Act. 50-9-103, MCA.

The Act provides procedures for other persons to consent to the withholding or withdrawal of life-sustaining medical treatment for persons who are incapacitated and terminally ill. 50-9-106, MCA.

A physician is a person licensed by the State to practice medicine. 53-9-102(10), MCA. A health care provider is a person licensed, certified or otherwise authorized by law to administer health care. 50-9-102(6), MCA.

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In all cases the physician must make a determination before withdrawing the medical treatment that the condition is incurable or irreversible and that the medical treatment only prolongs the process of dying and is not necessary to the comfort of the person or to alleviation of the person's pain. 50-9-105(1)(b) MCA. That determination must be recorded in the person's medical record. 50-9-201, MCA.

Life-sustaining medical treatment must be provided to a terminally ill person who has an appropriate declaration, if that person is pregnant and it is probable that the fetus will develop to the point of live birth as long as the life-sustaining treatment is provided to the person. 50-9-106(6) and 50-9-202(3), MCA.

A person may at any time and in any manner revoke a declaration. 50-9-104(1), MCA.

A designation of an attorney-in-fact pursuant to 72-5-501 and 72-5-502, MCA or the judicial appointment of another person to exercise authority in relation to a person, if containing specific authority for decision-making concerning life-sustaining treatment, constitutes a declaration under 50-9-103(1), MCA designating another person to provide consent for termination of life-sustaining treatment. 50-9-103(4), MCA.

A declaration executed in a manner substantially similar to 50-9-103, MCA in another state which is lawful in the other state

TN # 92-12

Supersedes TN No. New

Approval Date

7/9/92

Effective Date

4/1/92

is effective under the Montana Act. 50-9-111, MCA.

Declarations and revocations of declarations concerning treatment should be provided to attending physicians and health care providers and be made part of the person's medical records. 50-9-103(5) and 50-9-104(2), MCA.

A physician or health care provider who is unwilling to honor the written or oral declaration of a person or a decision-maker appointed by the person concerning the termination of medical treatment is responsible for the transfer of the care of the person to another health care provider who is willing to honor the declaration. 50-9-203, MCA.

II. POWER OF ATTORNEY FOR PURPOSES OF MAKING MEDICALLY NECESSARY DECISIONS

A. THE DESIGNATION UNDER MONTANA LAW OF A POWER OF ATTORNEY TO MAKE MEDICALLY NECESSARY DECISIONS ON BEHALF OF A PERSON WHO BECOMES INCAPACITATED

There is no specific statutory authority in Montana directed at the implementation of a power of attorney for purposes of making decisions concerning consent to medically-necessary procedures on behalf of a person who is incapacitated. The implementation of such authority, however, can be done under the general authority of the durable power of attorney statute. The statute does recognize a durable power of attorney that may be stated so as to be effective for the duration of a period of incapacity. This authority may be used to establish a durable power of attorney for the purpose of providing consent to medically necessary procedures

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or for termination of services during a period of incapacity or disability.

B. THE STATUTORY AUTHORITY FOR CREATING A DURABLE POWER OF ATTORNEY

The creation of a durable power of attorney is specifically provided in Montana by 72-5-501, MCA. The statute provides general authority for the granting of a durable power of attorney. The term of this authority must be stated in the writing that creates the power of attorney. The statute recognizes that the effectuation of a durable power of attorney may be predicated on the contingency of incapacity or disability and be limited to the period of that incapacity. 72-5-501(1), MCA.

The statutes governing the creation and exercise of the durable power of attorney, 53-5-501 and 53-5-502, MCA, do not provide any specific requirements for the execution and revocation of the document. The statutes do not enumerate the possible powers of the designated person and do not provide any specified limits on the authority of designated person. The durable power of attorney, however, may not be used to consent to the termination of medically necessary services unless the writing creating the power of attorney specifies that authority. 50-9-103(4), MCA.

There are no provisions in the statutes providing for enforcement of the exercise of the durable power of attorney as to third parties or for the reciprocal enforcement of durable powers of attorney arising in other states.

TN No. 92-12  
Supersedes  
TN No. new

Approval Date 7/9/92 Effective Date 4/1/92

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Form providing authority to another for consent. 53-9-103(3), MCA.

**DECLARATION**

If I should have an incurable and irreversible condition that, without the administration of life-sustaining treatment, will, in the opinion of my attending physician, cause my death within a relatively short time and I am no longer able to make decisions regarding my medical treatment, I appoint \_\_\_\_\_ or, if he or she is not reasonably available or is unwilling to serve, \_\_\_\_\_, to make decisions on my behalf regarding withholding or withdrawal of treatment that only prolongs the process of dying and is not necessary for my comfort or to alleviate pain, pursuant to the Montana Rights of the Terminally Ill Act.

If the individual I have appointed is not reasonably available or is unwilling to serve, I direct my attending physician, pursuant to the Montana Rights of the Terminally Ill Act, to withhold or withdraw treatment that only prolongs the process of dying and is not necessary for my comfort or to alleviate pain.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_  
Signature \_\_\_\_\_  
City, County, and State of Residence \_\_\_\_\_

The declarant voluntarily signed this document in my presence.

Witness \_\_\_\_\_  
Address \_\_\_\_\_  
Witness \_\_\_\_\_  
Address \_\_\_\_\_

Name and address of designee.

Name \_\_\_\_\_  
Address \_\_\_\_\_

TN # 92-12  
Supersedes  
TN No. new

Approval Date 7/9/92 Effective Date 4/1/92

Form providing individual consent. 53-9-103(2), MCA.

**DECLARATION**

If I should have an incurable or irreversible condition that, without the administration of life-sustaining treatment, will, in the opinion of my attending physician, cause my death within a relatively short time and I am no longer able to make decisions regarding my medical treatment, I direct my attending physician, pursuant to the Montana Rights of the Terminally Ill Act, to withhold or withdraw treatment that only prolongs the process of dying and is not necessary to my comfort or to alleviate pain.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_

Signature \_\_\_\_\_

City, County, and State of Residence \_\_\_\_\_

The declarant voluntarily signed this document in my presence.

Witness \_\_\_\_\_

Address \_\_\_\_\_

Witness \_\_\_\_\_

Address \_\_\_\_\_

TN # 92-12

Supersedes

TN No. new

Approval Date

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